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NO. 82-352

In The
Supreme Court of the United States
October Term, 1982

PUEBLO AIRCRAFT SERVICE, INC.,
Petitioner,

vs.

CITY OF PUEBLO, COLORADO, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

AMICI CURIAE BRIEF FOR THE STATE OF COLORADO AND THE STATES OF ALASKA, ILLINOIS, IOWA, MISSOURI, MONTANA, NEW HAMPSHIRE, NEW MEXICO, NEW YORK, OKLAHOMA, RHODE ISLAND, VERMONT, AND WISCONSIN IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED FOR REVIEW

Whether state statutes merely granting subordinate governmental units certain general powers to act in a particular subject-matter area and declaring the exercise of such powers to constitute "public, governmental functions" are, without more, sufficient to confer state action antitrust immunity upon those governmental units *whenever* they exercise those powers in *any* anticompetitive fashion?

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INTEREST OF THE AMICI CURIAE STATES

"The heart of our national economic policy long has been faith in the value of competition . . .," *Standard Oil Co. v. FTC*, 340 U. S. 231, 248 (1951), which is viewed as ultimately resulting in the better allocation of resources, lower prices, higher quality goods and services, and greater material progress in general. *See National Society of Professional Engineers v. United States*, 435 U. S. 679, 695 (1978); *Northern Pacific Railway v. United States*, 356 U. S. 1, 4 (1958). The national "commitment" to the policy of free and open competition in the marketplace is reflected in the antitrust laws, *see Community Communications Co. v. City of Boulder*, 102 S. Ct. 835, 843 (1982), which have been deemed essential to the "preservation of . . . our free enterprise system . . . ." *United States v. Topco Associates, Inc.*, 405 U. S. 596, 610 (1972).

In light of the preceding, it is not surprising that numerous states have likewise adopted their own general antitrust statutes to ensure competition within their boundaries. Often those state antitrust acts are construed in accordance with federal judicial decisions interpreting corresponding provisions of the federal antitrust laws,[1] and generally they are enforced by state attorneys general.[2] Additionally, under the federal antitrust laws the several states are authorized to bring private enforcement actions

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1 *See, e. g.*, Colorado v. North Avenue Furniture and Appliance, 645 P. 2d 1291 (Colo. 1982); Grams v. Boss, 97 Wis. 2d 332, 294 N. W. 2d 473 (1980); Marin County Bd. of Realtors v. Palsson, 130 Cal. Rptr. 1, 549 P. 2d 833 (1976); Oates v. Eastern Bergen Co., 113 N. J. Super. 371, 273 A. 2d 795 (1971); Pittsburgh Plate Glass Co. v. Paine & Nixon Co., 234 N. W. 453 (Minn. 1931).

2 *See, e. g.*, Colo. Rev. Stat. 1973, §§ 6-4-104 and 105 (Cum. Supp. 1981); Del. Code Ann., tit. 6, § 2113 (Supp. 1979); Ill. Rev. Stat. ch. 38, §§ 60-30 *et seq.* (1979); Md. Com. Law Code Ann., §§ 11-201 to 213 (1975); Neb. Rev. Stat., § 59-1603 (Cum. Supp. 1978).

for damages and injunctive relief on their own behalf, 15 U. S. C. §§ 15 and 26, *see Hawaii v. Standard Oil Co.*, 405 U. S. 251, 260-62 (1972), and, through their attorneys general, on behalf of their individual residents. 15 U. S. C. §§ 15c-h.

The *amici* states thus have a fundamental interest in seeing that the antitrust laws are given broad application at both the state and national levels in order to foster a competitive economic environment. The instant case has a direct, immediate and negative precedential impact on such interest. The ruling of the United States Court of Appeals for the Tenth Circuit in this case would, in effect, immunize from antitrust scrutiny all of the more than 80,000 subordinate governmental units in this country,[3] and those multitudinous private entities with whom they deal,[4] for all actions taken pursuant to any statutory authority whatever. If vested with such virtually automatic and blanket exemption, those units and entities would be able to engage with impunity in anticompetitive conduct. This would, inevitably, have a severely disruptive effect upon the nation's economic system. Consequently, the essential concern of the *amici* states with obtaining the bene-

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3 As of 1982, the most recent year for which figures are available, there were 38,872 cities, townships and counties, 28,733 special districts and 15,032 independent school districts in the country, for a total of 82,637 local governmental units nationwide. See Preliminary Report No. 1, United States Bureau of the Census, 1982 Census of Governments, Governmental Units in 1982 [hereinafter cited as Preliminary 1982 Census of Governments] at 4, Table 1 (1982).

4 The Tenth Circuit ruled in its opinion below that if the antitrust claims against a city must fall because it has immunity, then all associated antitrust claims against the private enities who are the city's alleged co-conspirators must likewise fall. See Pueblo Aircraft Service, Inc. v. City of Pueblo, 679 F. 2d 805, 806, 808 (10th Cir. 1982).

fits of competition for themselves and their citizenry has been adversely affected by the decision of the court below.

STATEMENT OF THE CASE

Facts

In 1948 the city of Pueblo, Colorado, in accordance with Colo. Rev. Stat. 1973, § 41-4-201 (included in appendix A hereto), acquired a former military airfield from the United States government in order to establish a municipal airport there. *See Pueblo Aircraft Service, Inc. v. City of Pueblo,* 679 F. 2d 805, 806 (10th Cir. 1982). Since prior to 1970 the city, in accordance with Colo. Rev. Stat. 1973, § 41-4-204 (included in appendix A hereto), leased portions of the airport and its facilities to three fixed base operators ("FBOs")—Pueblo Aircraft Service, Inc. ("Pueblo Aircraft"), Pan-Ark Aviation, Inc. ("Pan-Ark"), and Flower Aviation, Inc. ("Flower")—who, in turn, provided certain services and supplies to airport users. *See id.* at 806-07.

Under their separate lease agreements with the city, all three FBOs were authorized to engage in providing the same specified services and supplies to the public and were required to purchase from the city at the same predetermined price all aviation fuel made available by them for resale to airport users. *See Pueblo Aircraft Service, Inc. v. City of Pueblo,* 498 F. Supp. 1205, 1208 (D. Colo. 1980). In practice, however, only Pueblo Aircraft and Pan-Ark engaged in maintaining and repairing aircraft and conducting flying lessons at the airport, while only Pueblo Aircraft and Flower provided aircraft fueling and lubrication services there. *Id.* at 1212.

Several months prior to the scheduled March 31, 1977, expiration of Pueblo Aircraft's lease, the city decided to put out for public bid a new FBO lease for the premises

and facilities then occupied by Pueblo Aircraft. However, only Pan-Ark and Pueblo Aircraft submitted bids in response to the city's solicitation, and Pan-Ark's bid was accepted. On July 1, 1977, Pan-Ark entered upon a new lease with the city for the premises and facilities at the airport which, until then, had been occupied by Pueblo Aircraft pursuant to an extension of its lease. 679 F. 2d at 807. Thus, Pan-Ark became the sole FBO providing maintenance and repair of aircraft and conducting flying lessons at the airport, and Flower became the only FBO offering fueling and lubrication services there. *See* 498 F. Supp. at 1212.

Course of Proceedings

After losing its lease, Pueblo Aircraft filed the instant action in federal district court in Denver, Colorado, against, *inter alia*, the city of Pueblo, Pan-Ark and Flower. *See id.* at 1206-07. The complaint alleged that the exclusive fuel-purchase requirement constituted an illegal tying arrangement in violation of § 1 of the Sherman Act and § 3 of the Clayton Act, 15 U. S. C. §§ 1 and 14; that the defendants had conspired to eliminate Pueblo Aircraft as a competitor at the airport in violation of Sherman 1; and that the effect of the bidding process and subsequent lease was the creation of a monopoly in Pan-Ark for aircraft maintenance and repair services and student flying instruction in violation of Sherman 1. *See id.* at 1211-13, 1216.

Subsequent to the consensual dismissal of the claims against Flower, *id.* at 1207, the district court granted summary judgment for the remaining defendants, ruling, *inter alia*, that the city had state action immunity from the antitrust laws. *Id.* at 1210-11. In reaching that conclusion the court relied primarily on Pueblo's status as a home

rule city, citing the decision of the Tenth Circuit in *Community Communications Co. v. City of Boulder*, 630 F. 2d 704 (10th Cir. 1980). *See* 498 F. Supp. at 1209-10. Additionally, though, the district court characterized the city as "acting in a *governmental and not* in a *proprietary* capacity . . ." because state statutes authorized cities to acquire and operate airports and declared such actions to be "public, governmental functions." *Id.* at 1210 (emphasis added).

On appeal, the Tenth Circuit noted that the home rule aspect of the district court's opinion could not withstand scrutiny in light of this Court's subsequent reversal of the *City of Boulder* case, 102 S. Ct. 835 (1982). Nevertheless, citing Colo. Rev. Stat. 1973, § 41-4-101 (included in appendix A hereto), the Tenth Circuit affirmed the finding of immunity on what it termed the district court's "alternative" theory of "specific statutory authorization" conferring on cities the power to acquire and operate airports and declaring such activities to be "public, governmental functions." 679 F. 2d at 807-08.

Following the Tenth Circuit's denial of Pueblo Aircraft's petitions for rehearing and for rehearing *en banc* (*see* appendix B to Petition for *Certiorari*), Pueblo Aircraft has petitioned this Court for a writ of *certiorari*.

REASONS FOR GRANTING WRIT

The instant action constitutes the next logical development in the unfolding *City of Lafayette*[5] - *City of Boulder*[6] line of state action immunity cases in that it pre-

5 City of Lafayette v. Louisiana Power & Light Co., 435 U. S. 389 (1978).

6 Community Communications Co. v. City of Boulder, 102 S. Ct. 835 (1982).

sents questions of law not explicitly resolved in either decision.

Notwithstanding the foregoing, the Supreme Court's opinions in those two cases do provide guidance in this situation. Nevertheless, three months to the day after its previous state action decision was reversed by this Court in *City of Boulder,* the Tenth Circuit here flatly refused to follow the Court's *Boulder-Lafayette* teachings. Thus, for the second time in two years the Tenth Circuit has gone out of its way to find a Colorado city to have antitrust immunity on bases which have not previously been embraced by this Court and which fly in the face of both the precedent and policy expressed in this Court's prior rulings. In so acting, the Tenth Circuit has contributed to widening splits of authority among the lower federal courts.

In light of the preceding, the instant case presents important state action immunity issues which require decision by the Supreme Court. Consequently, *certiorari* should be granted in order that this Court may clarify the application of state action immunity principles to subordinate governmental units.

I. THE TENTH CIRCUIT'S DECISION DISREGARDS, AND ITS CONCOMITANT EFFECTS ARE THE PRODUCT OF THAT DISREGARD FOR, THE APPLICABLE GENERAL TEACHINGS AND UNDERLYING POLICY OF THE SUPREME COURT'S SEMINAL DECISIONS ON STATE ACTION IMMUNITY IN THE CITY OF LAFAYETE AND CITY OF BOULDER CASES.

In the landmark case of *City of Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389 (1978), the Supreme Court ruled that cities do not automatically have antitrust immunity under *Parker v. Brown,* 317 U.S. 341 (1943), just because they are governmental entities. In

an equally significant decision just this year in *Community Communications Co. v. City of Boulder*, 102 S. Ct. 835 (1982), the Court held that even home rule municipalities vested with all the legislative power of the state over local and municipal affairs have no blanket immunity from the antitrust laws. Notwithstanding these teachings, the court below ruled in effect that subordinate governmental units have automatic and blanket antitrust immunity whenever they engage in any anticompetitive activity in an area where they have statutory powers to act, at least if those powers can be deemed to be "public and governmental" in nature. *See Pueblo Aircraft Service, Inc. v. City of Pueblo*, 679 F. 2d 805 (10th Cir. 1982).

Although the instant case involves statutes applicable by their terms only to Colorado counties, cities and towns, and to the particular subject of airports, the impact of the Tenth Circuit's decision is nowhere near so limited. Within the State of Colorado alone, the opinion extends to immunize all 1,567 counties, municipalities, and school and other special districts[7] whenever they act in any of the myriad areas where they have any statutory powers, at least as long as such powers can be characterized as "public, governmental functions." The ruling does the same for the 7,303 counties, municipalities, townships and school and special districts within the other five states in the Tenth Circuit.[8] Moreover, by its reasoning the Tenth Circuit's decision logically extends to all of the 80,000-plus units of local government in this country[9] as well.

As noted in *City of Lafayette*, while the activities of local governmental units impact on the national economic

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7 *See* Preliminary 1982 Census of Governments, *supra* note 3, at 4, Table 1 (1982).

8 See *id.*

9 *Id.* at 1, Table A.

system in a wide variety of ways, 435 U. S. at 407-08, the economic choices made by those entities are not necessarily likely to comport with the broader economic policies of the antitrust laws. *Id.* at 403. Thus, as stressed in *Boulder*, if those units are left free to make such choices based only on their own parochial self-interests and without regard for the nation's economic goals embodied in the antitrust laws, serious economic dislocation could result. 102 S. Ct. at 840. The finding of virtually automatic and blanket antitrust immunity here will indeed enable all the subordinate governmental units within Colorado, the Tenth Circuit and the nation to place their own economic self-interests ahead of the regime of competition which is the fundamental principle governing commerce in this country. *See* 435 U. S. at 398. Such a result is directly contrary both to the teachings of *Lafayette* and *Boulder* and to the procompetitive principles on which those decisions are founded, and is more far-reaching than that which this Court sought to avoid with its ruling in *Lafayette*.[10]

II. THE TENTH CIRCUIT'S DECISION PRESENTS IMPORTANT STATE ACTION IMMUNITY ISSUES WHICH THE SUPREME COURT HAS NOT PREVIOUSLY RESOLVED EXPRESSLY AND SHOULD NOW SETTLE.

A. The case at hand presents the question whether governmental entities must meet two distinct tests, or merely one of two alternative formulations of the same test, in order to qualify for state action immunity.

On several occasions in recent years the Supreme

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10 In City of Lafayette the Court principally sought to avoid the potential anticompetitive threat posed by almost 40,000 counties, municipalities and townships. *See* 435 U. S. at 407-08. In the case at bar the potential anticompetitive impact includes those now 40,000-plus entities and extends to the more than 40,000 school and other special districts as well.

Court has identified requisites which must be met before state agencies or instrumentalities may qualify for the so-called "state action exemption" from the antitrust laws. It is now the rule that cities and other subordinate governmental units may gain immunity for their anticompetitive actions only to the extent such conduct is engaged in "pursuant to" a "clearly articulated and affirmatively expressed" state policy, *Community Communications Co. v. City of Boulder*, 102 S. Ct. at 842, displacing competition with regulation or monopoly public service, *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. at 413, where the challenged anticompetitive restraints are themselves "clearly articulated and affirmatively expressed" as part of that policy. *City of Boulder*, 102 S. Ct. at 841 n. 14.

The "clear articulation and affirmative expression" standard requires that the competition-displacement policy be forthrightly stated and clear in its purpose to permit the challenged restraints. *See California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U. S. 97, 105 (1980). In order for the particular anticompetitive actions at issue to be engaged in "pursuant to" a state policy embodying such restraints, however, express legislative authorization is not needed. Rather, it must only appear from the authority given the governmental entity to operate in the particular area that there exists implied authorization[11] for the anticompetitive activity

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11 Such authorization can be implied only *where*, and to the *minimum extent*, *necessary* to make the state's competition-displacement scheme work. *See* Corey v. Look, 641 F. 2d 32, 37 (1st Cir. 1981). *See also* Cantor v. Detroit Edison Co., 428 U. S. 579, 597 (1976); City of Lafayette v. Louisiana Power & Light Co., 435 U. S. at 417 (Marshall, J., concurring), 426 (Burger, C. J., concurring).

in the form of legislative "contemplation" of the kind of action complained of. *See City of Lafayette*, 435 U. S. at 415.

Thus, it would seem that a two-pronged standard of "clear articulation and affirmative expression" on the one hand, and at least implied, if not express, "authorization" on the other, must be met before anticompetitive municipal actions can qualify for state action immunity. Nevertheless, in *Boulder* this Court appeared to at least suggest by negative implication that a finding of implied authorization (in the form of "comprehension" within the powers granted, or legislative "contemplation") for cities to engage in specific anticompetitive actions might satisfy the requirement of "clear articulation and affirmative expression" required by precedent. *See* 102 S. Ct. at 843.

In light of the preceding, it is unclear whether the "clear articulation-affirmative expression" and "contemplation" standards present separate and distinct tests, both of which must be satisfied in order for municipalities to qualify for antitrust immunity, or whether they simply represent alternative formulations of the same test, the meeting of either one of which will suffice for immunity. The instant case squarely presents that issue.

Colorado has adopted an express statutory scheme relative to the acquisition and operation of airports by cities. *See* Colo. Rev. Stat. 1973, §§ 41-4-201 to 205 (included in appendix A hereto). However, those statutes do not constitute a legislative policy which is forthrightly stated and clear in its purpose to permit (*i.e.*, they do not "clearly articulate and affirmatively express") the anticompetitive restraints alleged here—tying arrangements, conspiracies to eliminate competitors, and the granting of monopolies—at municipal airports. To the contrary, Colorado's policy is expressly procompetitive in

the latter regard, *see* Colo. Rev. Stat. 1973, § 41-4-201 (exclusive leases for aircraft maintenance and repair services at municipal airports prohibited), a fact conveniently ignored by both the trial and appellate courts in this case. With respect to the former restraints, the absence of any state policy at most indicates official neutrality and therefore cannot satisfy the "clear articulation and affirmative expression" requirement. *See City of Boulder*, 102 S. Ct. at 843.

Consequently, the only way in which the city of Pueblo can be held to have the immunity found by the Tenth Circuit is if legislative "contemplation" of its anticompetitive activities suffices for state action immunity and can be implied from the statutory scheme here, or if the mere characterization of those activities as "governmental" in nature is determinative. Indeed, those essentially were the bases for the Tenth Circuit's finding of immunity in the case at bar. *See* 679 F. 2d at 809.

B. The instant case presents the question whether the mere general grant of power to act in an area necessarily conveys state action immunity with respect to any exercise of that power.

Only two prior decisions of the Supreme Court have even touched on the efficacy of general grants of authority in conferring state action immunity on subordinate governmental units. Although in *City of Lafayette* express statutory authorization existed for cities to act in a particular area (utilities), this Court did not resolve whether the general statutes there at issue (included in appendix B hereto) actually were sufficient to confer immunity but instead affirmed a remand to the trial court for development of a factual record. *See* 435 U.S. at 413-15. Somewhat conversely, in *City of Boulder* the Court did decide as a matter of law whether antitrust

immunity existed, but that was in the context of general municipal home rule self-governing power and absent any express authority for cities to act in the particular subject-matter area involved (cable television). *See* 102 S. Ct. at 843.

Thus, the Supreme Court has never expressly ruled on the precise issue presented in this case: whether the general grant to a local government of authority to act in a particular subject-matter area *necessarily* confers state action immunity on that government *whenever* it exercises such authority in an anticompetitive fashion. Undeterred by the lack of explicit guidelines from this Court, however, the Tenth Circuit has seized the opportunity presented by the instant case to declare another Colorado municipality immune from the antitrust laws.

1. The Tenth Circuit's decision ignores the applicable general teachings of prior landmark decisions of the Supreme Court.

Notwithstanding the preceding distinctions from the instant situation, in the aforementioned two cases this Court has at least suggested that mere general grants of authority to subordinate governmental units are ineffective to confer antitrust immunity for particular types of anticompetitive conduct. In *City of Lafayette* the Court held that statutes simply authorizing municipalities to own and operate utilities, 435 U. S. at 391, *do not necessarily* immunize particular anticompetitive actions by cities with respect to such utilities. *See id.* at 413-15. Just this year in *City of Boulder* the Court went further, ruling that even the grant to cities of broad general power to act *cannot necessarily* immunize their exercise of that power to engage in specific anticompetitive actions. *See* 102 S. Ct. at 843.

In its opinion the court below has completely disregarded the foregoing teachings. Specifically, the Tenth Circuit has held that, at least when viewed as "public and governmental" in nature, a mere general grant of authority to municipalities (here, to acquire and operate airports) *necessarily* carries with it legislative "authorization" to engage with impunity in specific anticompetitive conduct (such as imposing tying arrangements, conspiring to eliminate competitors and conferring monopolies).[12] Such a result flies directly in the face of the general precepts set forth by this Court in *Lafayette* and *Boulder*.

2. The Tenth Circuit's decision has contributed to a widening split among the federal courts of appeals.

Since *City of Lafayette* was decided in 1978, a significant number of federal appellate courts have had occasion to pass on whether the grant of mere general authority to act in a particular subject-matter area is sufficient to confer immunity when certain, not expressly authorized, anticompetitive actions are engaged in there. The Courts of Appeals for the First, Fifth, Seventh, Eighth and Ninth Circuits have all answered that question in the negative.[13] Conversely, however, in addition

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12 These are essentially the same types of conduct which failed to pass muster in City of Lafayette: tying arrangements and activities (such as sham litigation, restrictive covenants and long-term supply agreements) designed to prevent competition and preserve monopoly. *See* 435 U. S. at 392 n. 6.

13 *See* Corey v. Look, 641 F. 2d 32, 37 (1st Cir. 1981) (grant of authority to license ferry services insufficient to immunize monopolizing of or boycott in related parking market); Feminist Women's Health Center v. Mohammad, 586 F. 2d 530, 550 (5th Cir. 1978), *cert. denied*, 444 U. S. 924 (1979) (grant of authority to supervise practice of medicine insufficient to immunize use of such power to preclude practices not adjudicated illegal or improper); Whitworth v. Perkins, 559 F. 2d 378, 379-80 (5th Cir. 1977), *vacated and remanded sub nom.* City of Impact v. Whit-

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to the Tenth Circuit, the Third Circuit has recently answered that question in the affirmative.[14] Thus, a definite split of authority now exists among the federal circuits on this issue.

C. The case at bar presents the question whether the existence of state action immunity depends upon a finding that a governmental entity is acting in a "governmental" rather than a "proprietary" capacity.

The Tenth Circuit's finding of immunity in the instant case was partially predicated upon a so-called "proprietary-governmental" distinction as a test for state action immunity. Significantly, reliance upon such an analytical approach is nothing new for that court. In its opinion in the *Boulder* case the Tenth Circuit expressly distinguished *City of Lafayette*'s limitation on municipal antitrust immunity as being applicable only to "proprietary" activities and found the city of Boulder's supposedly "governmental" conduct immune. *See* 630 F. 2d at 708.

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worth, 435 U. S. 992, *reinstated on remand*, 576 F. 2d 696 (1978), *cert. denied*, 440 U. S. 911 (1979) (grant of zoning authority insufficient to immunize use of such power to restrain competition in sale of alcoholic beverages); Kurek v. Pleasure Driveway & Park Dist., 557 F. 2d 580, 590 (7th Cir. 1977), *vacated and remanded*, 435 U. S. 992, *reinstated on remand*, 583 F. 2d 378 (1978), *cert. denied*, 439 U. S. 1090 (1979) (grant of supervisory authority over golf course operation insufficient to immunize price fixing there); City of Kirkwood v. Union Electric Co., 671 F. 2d 1173, 1180 (8th Cir.), *pet'n for cert. filed*, 50 U. S. L. W. 3998.03 (U. S. June 11, 1982) (No. 81-2278) (grant of authority to charge regulated rates insufficient to immunize discriminatory charges to "price squeeze" competitor); Ronwin v. State Bar of Arizona, 1981-2 Trade Cas. (CCH) ¶ 64,414 (9th Cir. Dec. 14; 1981) (grant of authority to examine bar applicants insufficient to immunize use of such power to limit number receiving passing grades).

14 *See* Euster v. Eagle Downs Racing Ass'n, 677 F. 2d 992, 994-95 (3d Cir. 1982) (grant of general supervisory power over racing sufficient to immunize specific anticompetitive action of fixing jockeys' fees).

In the case at bar the Tenth Circuit, apparently seeking to divorce itself from its earlier opinion in *Boulder*, did not *explicitly* posit a proprietary-governmental distinction in its analysis. However, that court did base its finding of immunity on, *inter alia*, a legislative declaration that the questioned activity here was "governmental" in nature. *See* 679 F. 2d at 808. Additionally, as support for such conclusion the Tenth Circuit dusted off a series of pre-*Lafayette* state and federal court decisions dating back to 1898 differentiating between "proprietary" and "governmental" functions. *See id.* at 809-11.[15] Furthermore, the appellate court's quotation relative to "public, governmental functions" was taken from the same sentence of the district court's opinion wherein the lower court expressly concluded that the city of Pueblo was acting in a "governmental" *as opposed to* a "proprietary" capacity. *See id.* at 808, *quoting* 498 F. Supp. at 1210.

Despite the slightly less forthright approach, then, it is clear that in the instant case the Tenth Circuit once again utilized a proprietary-governmental distinction to find a Colorado city immune from the federal antitrust laws. Thus, the case at bar provides an opportunity for this Court explicitly to announce whether a subjective proprietary-governmental analysis serves any purpose in assessing a municipality's immunity from the federal antitrust laws.

1. The Tenth Circuit's opinion ignores the teachings of prior applicable decisions of this Court and further contributes to a split among the lower federal courts.

Apparently, the decisive vote of Chief Justice Burger

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15 It is noteworthy that the primary case relied upon by the Tenth Circuit in this regard, E. W. Wiggins Airways v. Massachusetts Port Auth., 362 F. 2d 52 (1st Cir. 1956), *cert. denied*, 385 U. S. 947 (1966), was expressly overruled last year. *See* Corey v. Look, 641 F. 2d 32, 37 n. 7 (1st Cir. 1981).

against antitrust immunity in *City of Lafayette* was predicated on his subjective perception of the activity there challenged as "proprietary" in nature. *See* 435 U. S. at 418-24 (Burger, C. J., concurring), 432-35 (Stewart, J., dissenting). It is clear, however, that the *Lafayette* plurality opinion focused not on the subjective nature of the activity but on whether the city was acting as an instrumentality of the state pursuant to a state policy displacing competition with regulation or monopoly public service. *See id.* at 408-18.

More significantly, in the two state action immunity cases decided by the Supreme Court between *Lafayette* and *Boulder*, neither the Chief Justice nor any other member of the Court made any mention of a supposed proprietary-governmental distinction. *See California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U. S. 97 (1980); *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U. S. 96 (1978). Both decisions involved what subjectively could be characterized as purely "governmental" activity: the regulation by governmental agencies of distribution schemes pertaining to certain products (wine in *Midcal* and automobiles in *Fox*). Nevertheless, immunity was found to exist for the supposedly "governmental" activity only in the one case (*Fox*) and not in the other (*Midcal*). If the proprietary-governmental distinction envisioned by the Tenth Circuit did, in fact, exist, both decisions would have resulted in a finding of immunity.

Midcal and *Fox* make clear, then, that the mere susceptibility of an activity to subjective categorization as "governmental" does not qualify it for state action immunity. Rather, it is the meeting of the case law-established requisites which entitles a particular activity to

such immunity. *See* 445 U. S. at 105; 439 U. S. at 109. Simply put, then, any subjective classification of activity as "proprietary" or "governmental" in nature is meaningless for purposes of antitrust immunity analysis.[16]

Thus, it is not surprising that in its opinion in *Boulder* this Court ignored the Tenth Circuit's explicit reliance on a proprietary-governmental distinction.[17] In resurrecting such distinction in the case at bar, the Tenth Circuit has continued to ignore the prior teachings of this Court and has further contributed to a split among the lower federal courts on this point.[18]

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16 Two very significant policy reasons support this Court's refusal to employ a proprietary-governmental distinction in state action immunity analysis. First, such an analytical approach would lead to anomalous immunity results: even though the anticompetitive effect could be exactly the same, a city would not have antitrust immunity if it operated its own company in a particular area but would be exempt if it simply allowed a private entity to operate in that area in exactly the same way under regulation by the city. *See* City of Lafayette v. Louisiana Power & Light Co., 435 U. S. at 432-33 (Stewart, J., dissenting). Second, the wide range of services provided by governments in this day and age makes it almost impossible to determine what constitutes "proprietary" activity. *Id.* at 433-34 (Stewart, J., dissenting). Indeed, virtually any and all action by governments can subjectively be labeled "governmental." Community Communications Co. v. City of Boulder, 630 F. 2d at 717 (Markey, C. J., dissenting).

17 The only mention of a proprietary-governmental distinction in the Supreme Court's Boulder opinion was a passing reference to the fact that the Chief Justice had relied on such a distinction in his Lafayette concurrence. *See* 102 S. Ct. at 840 n. 13.

18 *Compare* In re Airport Car Rental Antitrust Litigation, 474 F. Supp. 1072, 1087-88 (N. D. Cal. 1979), Shrader v. Horton, 471 F. Supp. 1236, 1242 (W. D. Va. 1979), *aff'd per curiam*, 626 F. 2d 1163 (4th Cir. 1980), and Cedar-Riverside Assocs. v. United States, 459 F. Supp. 1290, 1298-99 (D. Minn. 1978), *aff'd on other grounds sub nom.* Cedar-Riverside Assocs. v. City of Minneapolis, 606 F. 2d 254 (8th Cir. 1979) (utilizing proprietary-governmental distinction), *with* Grendel's Den., Inc. v. Goodwin,

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2. A determination that the acquisition and operation of municipal airports by cities are "public, governmental functions" is not sufficient, under the tests enunciated by this Court, to confer state action immunity upon cities engaging in such activities.

In this case the Tenth Circuit apparently concluded that, by declaring the acquisition and operation of municipal airports to be "public, governmental functions," the legislature intended to confer state action immunity upon cities whenever they engaged in such activities. The manner in which the Tenth Circuit arrived at this conclusion, however, does not comport with the analytical approach required by the prior decisions of the Supreme Court on state action immunity. As this Court indicated in *Boulder*, because only the federal government and the states are sovereign, other entities are immune from the antitrust laws only when carrying out a *state* competition-displacement policy. Assessing whether an entity's anticompetitive actions are manifestations of a state policy rather than

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662 F. 2d 88, *rev'd on reh'g on other grounds*, 662 F. 2d 102 (1st Cir. 1981), Corey v. Look, 641 F. 2d 32 (1st Cir. 1981), Feminist Women's Health Center v. Mohammad, 586 F. 2d 530 (5th Cir. 1978), *cert. denied*, 444 U. S. 924 (1979), Whitworth v. Perkins, 559 F. 2d 378 (5th Cir. 1977), *vacated and remanded sub nom.* City of Impact v. Whitworth, 435 U. S. 992, *reinstated on remand*, 576 F. 2d 696 (1978), *cert. denied*, 440 U. S. 911 (1979), Stauffer v. Town of Grand Lake, 1981-1 Trade Cas. (CCH) ¶ 64,-029 (D. Colo. Oct. 9, 1980), *appeal docketed*, No. 80-2332 (10th Cir. Dec. 19, 1980), Highfield Water Co. v. Public Serv. Comm'n, 488 F. Supp. 1176 (D. Md. 1980), Mason City Center Assocs. v. City of Mason City, 468 F. Supp. 737 (N. D. Iowa 1979), *aff'd*, 671 F. 2d 1176 (8th Cir. 1982), City of Mishawaka v. American Elec. Power Co., 465 F. Supp. 1320 (M. D. Ind. 1979), *aff'd in part, rev'd in part on other grounds*, 616 F. 2d 976 (7th Cir. 1980), *cert. denied*, 449 U. S. 1096 (1981), and United States v. Texas State Bd. of Pub. Accountancy, 464 F. Supp. 400 (W. D. Tex. 1978), *aff'd per curiam*, 592 F. 2d 919 (5th Cir.), *cert. denied*, 444 U. S. 925 (1979) (not utilizing proprietary-governmental distinction).

part of a purely individual plan to displace competition is precisely the purpose of the state action immunity tests which have been announced by this Court in recent years.

The Tenth Circuit in this case found the requisite state policy reflected in a mere declaratory statute enacted by the Colorado legislature in 1945. *See* 1945 Colo. Sess. Laws ch. 4, p. 38. However, it is inconceivable that, in adopting the "public, governmental functions" language some thirty-three years prior to the Chief Justice's concurring opinion in *City of Lafayette*, the legislature thereby intended to enact a competition-displacement policy sufficient to qualify for state action immunity. It is far more likely that by this declaration the legislature intended to ensure that in establishing and operating their airports, cities would have immunity from personal injury suits brought under state law, *see Schwalb v. Connely*, 116 Colo. 195, 179 P. 2d 667 (1947), and that they would have eminent domain power as well. *See Duff v. City and County of Denver*, 147 Colo. 123, 362 P. 2d 1049 (1961). *See also Rocky Mountain Motor Co. v. Airport Transport Co.*, 124 Colo. 147, 235 P. 2d 580 (1951). Consequently, the Tenth Circuit's conclusion in this regard is insupportable as a matter of statutory interpretation.

More importantly, that conclusion is totally inconsistent with the principle of federalism embodied in this country's dual system of sovereignty and upon which this Court's prior state action decisions are predicated. The reservation of sovereign powers to the federal government and the states ordinarily has the effect of limiting the serious economic disruptions which could result if the tens of thousands of local government units in this country were free to pursue their own economic self-interests. It is because of such potential for economic dislocation and dis-

ruption that this Court has restricted the instances in which state action antitrust immunity is available to subordinate governmental entities. *See City of Boulder*, 102 S. Ct. at 840; *City of Lafayette*, 435 U. S. at 402-08. However, rather than limiting cities' freedom to pursue their own self-interests, the Tenth Circuit's decision in this case leaves each city free to follow whatever economic policy it desires. The result, in effect, is that cities are elevated to the status of states, immune from the antitrust laws despite the fact they may be effectuating their own anticompetitive policies rather than acting pursuant to a state competition-displacement policy. Such result is the antithesis of that which the principle of federalism seeks to foster.

CONCLUSION

The Tenth Circuit's decision here would confer virtually automatic, blanket antitrust immunity not only on the 80,000-plus local government units in this country in the myriad areas where they have statutory powers, but also on the private entities who follow the dictates of those units in such areas. *See Cantor v. Detroit Edison Co.*, 428 U. S. 579, 592 (1976). For these and all the foregoing reeasons, this Court should grant *certiorari* and reverse the decision of the court below.

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APPENDIX A

COLORADO REVISED STATUTES 1973

TITLE 41
AERONAUTICS: AIRCRAFT AND AIRPORTS

ARTICLE 4
AIRPORTS

PART 1
COUNTY AIRPORTS

41-4-101. Operation a governmental function. The acquisition of any lands for the purpose of establishing airports or other air navigation facilities; the acquisition of airport protection privileges; the acquisition, establishment, construction, enlargement, improvement, maintenance, equipment, and operation of airports and other air navigation facilities; and the exercise of any other powers granted in this part 1 to any county, city and county, city, or town are hereby declared to be public governmental functions, exercised for a public purpose, and matters of public necessity; and such lands and other property, easements, and privileges acquired and used in the manner and for the purposes enumerated in this part 1 are hereby declared to be acquired and used for public purposes and as a matter of public necessity.

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PART 2

AIRPORTS - CITIES AND TOWNS

41-4-201. Power to establish airports. The city councils and boards of trustees in towns have the power to acquire, establish, construct, own, control, lease, equip, improve, maintain, operate, and regulate airports and

landing fields for the use of airplanes and other aircraft either within or without such municipalities or may set apart and use for such purpose real property owned by such cities and towns. Any lands previously acquired by any town or city in the state of Colorado for park purposes may be used for any of the purposes specified in this section. On any airports so established, city councils and boards of trustees in towns shall grant no exclusive concession, license, or lease agreement relating to the business of servicing, repairing, or furnishing supplies for aircraft.

41-4-202. How lands acquired. Real property needed by a city or town for an airport or landing field shall be acquired by purchase if the city or town is able to agree with the owners on the terms thereof and otherwise by condemnation in the manner provided by law for acquiring real property for public purposes.

41-4-203. Power to incur indebtedness and to issue bonds. The city councils or boards of trustees in towns have the power to incur indebtedness for any of the purposes mentioned in this part 2 and to issue bonds for the acquisition, construction, and improvements of airports and landing fields and appurtenances thereto, in the same form and manner as debt is incurred and bonds are issued for other municipal purposes.

41-4-204. Jurisdiction to regulate use. In connection with the erection or maintenance of any such airport or air navigation facilities, any city or town, or any municipal corporation, has the power and jurisdiction to regulate the receipt, deposit, and removal and the embarkation of passengers or property to and from such landing

places or moorage as may be provided; to exact and require charges, fees, and tolls, together with a lien to enforce their payment; to lease or assign for operation such space or area, appurtenances, appliances, or other conveniences necessary or useful in connection therewith; to own and operate municipal aircraft; to employ pilots; to provide rules and regulations covering the use of such airport and facilities and the use of other property or means of transportation within or over the airport; to perform any duties necessary or convenient for the regulation of air traffic; to enter into contracts or otherwise cooperate with the federal government or other public or private agencies; and otherwise to exercise such powers as may be required or convenient in the promotion of aeronautics and the furtherance of commerce and navigation by air.

41-4-205. Funds may be raised by taxation. The city council or board of trustees may annually appropriate and cause to be raised by taxation in such city or town a sum sufficient to carry out the provisions of this part 2.

APPENDIX B

LOUISIANA REVISED STATUTES

TITLE 33
MUNICIPALITIES AND PARISHES

CHAPTER 2. LOCAL GOVERNMENT
PART VIII. INTERGOVERNMENTAL FUNCTIONS

§ 1326. ***Service agreements***

Any parish or municipality operating a gas, water, or electric light or power system, sewerage plant, or transportation system, may extend such services to persons and business organizations located outside its territorial bounds, or to any other parish or municipality. Such extension shall be in accordance with the terms of service agreements entered into by the parish or municipality supplying the service and the persons, business organizations, parishes, or municipalities receiving the service.

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CHAPTER 10. PUBLIC UTILITIES
PART I. OWNERSHIP, OPERATION, AND FINANCING

SUB-PART A. GENERAL POWERS

§ 4162. ***Power to own and operate; power to lease***

Any municipal corporation or any parish or any other political subdivision or taxing district authorized to issue bonds under Section 14 of Article 14 of the Constitution of Louisiana of 1921, may construct, acquire, extend, or improve any revenue producing public utility and property necessary thereto, either within or without its boundaries, and may operate and maintain the utility in the interest of the public.

A municipal corporation may lease waterworks systems, electric light and power plants, combined water and electric systems, garbage plants, sewerage works, electric street and interurban railways, gas plants and distributing systems.

No municipal corporation may lease or purchase gas fields, wells, lands, or holdings for the purpose of drilling and operating gas wells.

A parish may lease gas plants, gas distributing systems, gas wells, gas lands and holdings.

§ 4163. *Sale and distribution of commodity or service; establishment of rates and regulations*

The municipal corporation, parish, political subdivision, or taxing district may sell and distribute the commodity or service of the public utility within or without its corporate limits and may establish rates, rules, and regulations with respect to the sale and distribution.